that they required consideration and I do not think they received it. I am further of opinion that, even if there was jurisdiction to decide such matters in these proceedings, it was highly undesirable, and the Court should have refused, to do so. The proper remedy, if any, of the respondents was by action for specific performance. Rights as between them and the appellant arising from the reinstated charge could properly be settled in that action.

I think this appeal should be allowed, and concur in the order proposed by the learned President.

Appeal allowed.

FOOK LEE TIN MINING KONGSI v. GURDEV SINGH.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. — Civil Appeal No. 46 of 1951]

Promissory Note — Bills of Sale Ordinance, ss. 6 and 8 — Evidence Ordinance, 1950, s. 91 — Loan to a partner of a firm.

The plaintiff-respondent sued on a document executed by the managing partner of the defendants-appellants in the following terms:

23rd August, 1950.

"ON DEMAND I, the undersigned Choi Poh the managing partner of Fook Lee Tin Mining Kongsi, Malim Nawar, promise to pay Gurdev Singh or order the sum of Dollars Four thousand only for value received in cash with interest thereon at the rate of $3 per every hundred dollars per mensem.

As security for the above loan I do hereby give my one 130 H.P. Fairbank-Morse Oil Engine No. 730499 two cylinder.

FOOK LEE MINING KONGSI,
(Sd.) (In Chinese)
Manager."

Held, that whatever the intentions of the party the document was a bill of sale and as it was not registered as such it was void; but the fact that the bill of sale was void did not extinguish the debt.

Cases referred to:—

(1) *Bradford Advance Co. Ltd. v. Ayers & Wife* (1924) W.N. 152.

(2) *Davis v. Rees* 17 Q.B.D. 408.

COURT OF APPEAL.

H. T. Ong for the appellants.

S. M. Sharma for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J.: — The defendants in this case are a mining partnership of which one Choi Poh was at all material times, but is no longer, the managing partner.

On 23rd August, 1950, the plaintiff paid to Choi Poh the sum of $4,000 and on the same day Choi Poh executed a document in the following terms:—

23rd August, 1950.

"ON DEMAND I, the undersigned Choi Poh the managing partner of Fook Lee Tin Mining Kongsi, Malim Nawar, promise to pay to Gurdev Singh or order the sum of Dollars Four thousand only for value received in cash with interest thereon at the rate of $3 per every hundred dollars per mensem.

As security for the above loan I do hereby give my one 130 H.P. Fairbank-Morse Oil Engine No. 730499 two cylinder.

FOOK LEE MINING KONGSI,
(Sd.) (In Chinese)
Manager."

This sum of $4,000 has never been repaid and on 9th January, 1951, the plaintiff commenced proceedings against the present appellants as defendants for its recovery. In view of the subsequent course of the matter, it is desirable to consider the nature of these proceedings in some detail.

In his plaint, the plaintiff stated that on 23rd August, 1950, "the defendants . . . borrowed from the plaintiff . . . the sum of $4,000 and on the same day executed a promissory note in favour of the plaintiff." The promissory note in question was the document which has already been quoted. He then proceeded to claim the sum of $4,000 and interest on that sum at the rate of 3% per mensem from 23rd August, 1950, until date of judgment.

The defence was two-fold. In the first place, it was said that the defendants never borrowed any sum of money from the plaintiff, that the loan of $4,000 was given by the plaintiff to Choi Poh personally and that Choi Poh never had any authority of any sort to borrow money on behalf of the partnership. In the second place, it was said that the document executed by Choi Poh was a bill of sale and was void by reason of never having been registered and not being made in the form prescribed by law.

The matter came on for trial in due course before Hill, J. who found that the money in question was a loan by the plaintiff to the defendants and that the document exhibited to the plaint, which had been admitted in evidence without any objection to its admissibility having been raised by counsel for the defendants, was a promissory note and not a bill of sale. He accordingly gave judgment for the plaintiff

for $4,000 and interest as prayed for. It is against that judgment that the defendants have now appealed.

In his judgment the learned trial Judge held that the document already quoted *supra* "is, and was intended to be, a promissory note" and was not a bill of sale. Irrespective of the parties' intentions I am of the opinion that the document is a bill of sale. It was common ground that the document had not been registered as a bill of sale under section 8 of the Bills of Sale Ordinance and in fact it could never have been so registered as it was not in the form prescribed by form A in the Schedule to the Ordinance. Consequently, under paragraph (b) of section 6 of the Ordinance, it is void. The fact that the bill of sale is void does not extinguish the debt but it has important repercussions in this appeal for under section 91 of the Evidence Ordinance, 1950 "when the terms of a contract . . . have been reduced by or by consent of the parties to the form of a document ... no evidence shall be given in proof of the terms of such contract . . . . except the document itself."

At the hearing the plaintiff very naturally placed considerable reliance on the document exhibited by him as a promissory note but which is, for the reason I have just stated, void and inadmissible in evidence. It becomes necessary therefore to consider the evidence which remains after that relating to the making of the contract itself is excluded to ascertain if the making of the loan, and therefore the implied undertaking to repay, is established. Ample evidence remains to prove that plaintiff handed $4,000 to Choi Poh but Choi Poh was not the defendant. The defendants were a mining partnership of which Choi Poh was the manager.

In this case the preliminary negotiations were apparently of short duration and the only relevant and admissible evidence I can find which tends to connect the loan with the partnership consists of three sentences as follows: — "I lent him $4,000. Choi Poh came to me with Tara Singh as his partners wanted to put another engine on the mine. He (Choi Poh) told me this." Other witnesses mentioned loans they had made to the partnership and that is as far as the plaintiff's case can be taken. As against this one of the partners produced cogent evidence: she produced the Journal and Day Book of the partnership neither of which contained any reference to the alleged loan. This was an important item of evidence since it is the duty of an agent to keep accurate accounts of all his transactions on behalf of his principal. The same witnesses, who, as administratrix of the estate of Chui Yin (deceased) had an important holding in the partnership, produced a power of attorney by which she appointed Choi Poh and Chung Yuk Lun to be her attorneys for all purposes connected with this particular tin mine. That power of attorney expressly states that "all the powers hereby conferred by me on my said attorneys shall be exercised by them jointly and not severally."

On this evidence it seems to me clear that the plaintiff did not establish his case and I would allow this appeal and set aside the order made in the lower Court. I would allow appellant his costs here and in the Court below and direct that the sum of $500 deposited in Court be paid out to the appellants or their solicitors.

Thomson, J. : — I have had the advantage of reading the Judgment of the learned President with which, with respect, I am in entire agreement. I agree that the document in question is a bill of sale. I do not say for one moment that it may not be *pro tanto* a promissory note. Even so, however, I find it impossible to say that it is not a bill of sale within the very wide definition of such instruments contained in the local enactment (Cap. 57, section 3). I am bound, I think, to assign to the words of the instrument their ordinary and natural meaning, and the instrument itself says that the maker of it "gives" a specified chattel "as security for the above loan". As a matter of the ordinary use of language, I greatly regret that I am unable to agree with the trial Judge that these words were "nothing more than a note of the fact that there was an engine at the mine for the security of the plaintiff".

Once it is established that the instrument is a bill of sale the conclusions arrived at by the learned President are inescapable, and I would accordingly allow the appeal and concur in the order proposed.

Briggs, J. : — One Choi Poh was the managing partner of the appellant firm. He borrowed from the respondent a sum of $4,000 and gave him a promissory note which began :—

"On demand I the undersigned Choi (sic) Poh the managing partner of Fook Lee Tin Mining Kongsi, Malim Nawar, promise....."

It was signed "Fook Lee Tin Mining Kongsi, Choi Poh, Manager". There is no doubt on this wording that he purported to borrow on behalf of the firm. The first issue on the appeal is whether he had authority to do so. It is not proved that he had any express authority, and I think that in the case of a mining, as opposed to a trading, partnership it is doubtful if any authority to borrow should be implied from the mere fact of partnership. It is, however,

contended by the respondent, and the learned trial Judge found, that authority to borrow for the purposes of the partnership must in this case be implied from the course of dealing between the firm and this and other lenders. The respondent's case on this issue is now strengthened by the production before us of a document, not disclosed by the appellant and therefore not in evidence at the trial, but put in evidence on the appeal by leave. It is a formal bill of sale executed in favour of the Chinese Tin Mines Rehabilitation Loans Board by Choi Poh on behalf of the firm, and is signed by him for the firm in the same way as the promissory note now in issue. It pledges the firm's plant for a loan. It was later signed by Madam Ng Keow, who is now the principal partner, presumably to indicate her admission that it binds the firm. Even without that document, I should have considered that the learned trial Judge was right on this issue: with it, I think the case is too clear for argument. But that does not conclude the matter.

The promissory note contains the words, "as security for the above loan I do hereby give my one 130 H.P. Fairbank-Morse Oil Engine No. 730499 two cylinder." I am of opinion that the engine was a chattel — there was no suggestion to the contrary — and it is common ground that it remained in the possession of the firm. I am of opinion that document was thus a bill of sale. It is irregular as a bill of sale in that it is not in the statutory form — (section 6 of the Bills of Sale Enactment Cap. 57). It is therefore void *ibid.* It is not registered and is therefore inadmissible in evidence (section 20). The learned trial Judge held that this was not a bill of sale, because (a) it was a promissory note, (b) there was no sale of the engine, but merely a statement that it was to be security for the loan. As regards (a), a document may well be both a promissory note and a bill of sale. I think this is. As regards (b), the creation of security is of the essence of a bill of sale, and no actual transfer of ownership is required. The respondent sought to support the document by section 83(3) of the Bills of Exchange Ordinance, 1949, which reads :—

> "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof."

This, however, relates only to its validity as a promissory note: it does nothing to save an instrument which is void under the provisions of the Bills of Sale Enactment. On the ground that the document is void and inadmissible in evidence I think the plaintiff's claim on it should have been dismissed.

The question whether in the circumstances the respondent is none the less entitled as against the appellant firm to repayment of the principal sum of $4,000 presents some difficulty. In England he would be so entitled as against Choi Poh in appropriate proceedings; but it seems clear that his cause of action, whether or not it is considered as relating to some part of the contract of loan which is not avoided by the Act, is for money had and received; in other words he does not recover on the contract, but under implied contract, if one may be permitted still to use that much criticized but well understood term. See *Hailsham* Vol. 3 page 63, *Bradford Advance Co. Ltd. v. Ayers & Wife*[1]. I think it is possible to read the plaint in this action as both a claim on a promissory note and a claim in contract for repayment of money lent, but I do not think it can fairly be read as a claim for money had and received by the defendants to the plaintiff's use. A further difficulty arises from section 20 of the Bills of Sale Enactment and section 91 of the Evidence Ordinance, 1950. Section 20 has of course no counterpart in English law, and this must be borne in mind in reading the English cases. The contract between the parties in this case was for a loan of $4,000 to be repaid with interest and secured by certain chattels. That contract was "reduced to the form of a document" and was also, I think, "required by law to be reduced to the form of a document", within the meaning of section 91, the document being the promissory note, which is by statute both void and inadmissible in evidence. But under section 91 the contract cannot be proved by any means other than that document, for I cannot find that any of the circumstances which would permit the use of secondary evidence of it exist here. See section 65 of the Evidence Ordinance. If the contract as a whole cannot be proved, it is not, I think, open to the plaintiff to prove a part of it as a separate contract. He could prove the payment of $4,000 and that it had been made under a void contract. As no interest was ever paid, he might show that it was paid on a consideration which wholly failed. He might be able to prove mutual mistake. He might succeed on general grounds of "unjust enrichment" or "unjust benefit". The case of *Davis v. Rees*[2] turned on the ability of the mortgage to prove the agreement to repay, although the security was avoided. Here no agreement to repay can be proved.

It may be suggested that oral evidence can be given that the money was "borrowed", but I think that may involve a confusion of thought. In so far as the word "borrowed" imports and implies an agreement to

repay (which, I agree, it normally does), evidence of a "borrowing" is *pro tanto* evidence of a contract which is precisely what the statutes preclude. The act of payment and the circumstances which enable the payer to reclaim the money are not adequately expressed by the word "borrowed" alone. It is only necessary to glance at *Bullen and Leake* to see how widely different in form are claims for repayment of money lent and claims on an implied contract. The defences which can be raised also differ widely. If the respondent had clearly pleaded in implied contract, the appellant might well have raised quite different defences. It may be that, although Choi Poh could have bound the appellants contractually, the obligation under implied contract would be confined to him personally. Such points were not considered at the trial, since they were never raised. The learned trial Judge rightly treated the action as one of contract and contract only. While fully appreciating the desirability of putting an early end to the litigation between the parties, I think that to give judgment at this stage on a basis of implied contract might be to deprive the appellants of valuable rights of defence. It is to be observed that the learned trial Judge made no finding that the money was actually received or used by the appellant firm. No such finding was necessary to the conclusion which he reached, and the question was not fully tried. For this purpose production, or at least a formal demand for production, of the firm's books would be essential. If in fact the money was not "had and received" by the appellant firm as such, I doubt very much whether the respondent could obtain judgment against anyone other than Choi Poh. I do not think this Court ought to make a finding on this issue of fact.

If the claim were against Choi Poh alone, he could have no defence to a claim for $4,000 as money had and received, and in that case I should not allow a defect of form in the plaint to prevent us from giving judgment against him in order to put an end to the litigation. Where, however, there is at least a possibility that the firm might successfully defend an action for money had and received, and the claim has never been properly before the Court on that basis, I think they must be given the opportunity so to defend. Without prejudice, therefore, to any future claim by the respondent on that basis, I think the appeal should be allowed with costs here and below, that the judgment of the Court below should be set aside, and that the deposit should be paid out to the appellants' Solicitors.

Order accordingly.

M. PAKIAM v. Y. P. DEVATHANJAM.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. — Civil Appeal No. 48 of 1951]

Confused plaint — New trial.

The Court of Appeal found that the plaint was confused and unsatisfactory and that the trial Judge had based his decision on a ground which was not tenable; the appeal was allowed and (Briggs, J. dissenting) an order was made striking out the plaint, liberty being given to file a fresh plaint.

Cases referred to :—

(1) *Ong Ee Lim v. The Government of the Federated Malay States* (1937) M.L.J. 40 at 44; (1936) F.M.S.L.R. 239 at 248.
(2) *Davy v. Garrett* 7 Ch. 473.
(3) *Mohummud Z. A. Khan v. Mussumat Thakoranee Rutta Koer* 11 Moore Ind. App. 468 at 473.
(4) *Foster v. Mackinnon* L.R. 4 C.P. 754.
(5) *Raffles v. Wichelhaust* (1864) 2 H. & C. 906.
(6) *Whincup v. Hughes* L.R. 6 C.P. 78.
(7) *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co.* (1941) A.C. 55, 65; (1940) 4 All E.R. 169 at 174.
(8) *McGovern v. James Nimmo & Co.* (1937) S.C. 473.

COURT OF APPEAL.

M. Edgar for the appellant.

S. M. Sharma for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — The appellant was a party to a rubber tapping contract on the Gunong Panjang Estate, Gopeng. In November, 1950, this contract was assigned by the appellant to the respondent. How the negotiations for this assignment originated is not clear as the evidence of the parties is in direct conflict and the learned trial Judge, for a reason which will appear later, made no finding of fact on this point. A few days after this assignment an agreement in writing was prepared at the request of the respondent and duly executed by both parties. The following day the Estate was sold and the tapping contract thus terminated.